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NO. 86-493

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

TEXAS STATE COMMISSION FOR THE BLIND
AND THE STATE OF TEXAS,
*Petitioners*

V.

THE UNITED STATES OF AMERICA,
*Respondent.*

On Petition For Writ of Certiorari To The
United States Court Of Appeals For
The Federal Circuit

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1) Can a Federal Agency Appeal A Decision Of An Arbitration Panel Properly Convened Pursuant To 20 U.S.C. § 107d When This Provision Provides That The Decision Of Such Panel Shall Be Final And Binding?

2) Even If A Federal Agency Has A Right To Appeal An Arbitration Award, Has The Department Of Defense Waived This Right By Failing To Take Any Action Until Suit To Enforce The Award Was Filed?

3) Can A Court Of Appeals Properly Overrule The Interpretation Placed Upon 20 U.S.C. § 107d-3 ("The Military Exchange Exemption") By The Secretary Of Health, Education, And Welfare (Now Education) Since That Agency Was Designed By Congress To Oversee And Enforce 20 U.S.C. § 107?

4) Whether The Exemption From Vending Machine Income Sharing Contained In The Randolph-Sheppard Act, 20 U.S.C. § 107d-3(d), Applies To All Machines Under The Control Of The Military Exchanges Or Only To Vending Machines Within Retail Stores?

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# PETITION FOR WRIT OF CERTIORARI

## OPINIONS BELOW

This petition seeks review of a divided decision of the United States Court of Appeals for the Federal Circuit, sitting *en banc*, which is reported at 796 F.2d 400 and reprinted as Appendix A.[1] The opinion and judgment of the United States Claim Court (Merow, J.) is reported at 6 Cl. Ct. 730 and reprinted as App. B. The final decision of the arbitration panel is reprinted as App. C.

1. References to the appendices will be styled, e.g., "App. A." and cited by page number as they appear in the separately bound appendix (e.g., "A-23," "B-21"); references to the Joint Appendix in the Court of Appeals will be cited as "J.A."

## JURISDICTION

The decision and judgment of the Court of Appeals, sitting *en banc*, were entered on June 26, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

This case involves several provisions of the 1974 amendments to the Randolph-Sheppard Act.

20 U.S.C. § 107d-1(b):

> (b) Whenever any State licensing agency determines that any department, agency, or instrumentality of the United States that has control of the maintenance, operation, and protection of Federal property is failing to comply with the provisions of this chapter or any regulations issued thereunder (including a limitation on the placement of operation of a vending facility as described in section 107(b) of this title and the Secretary's determination thereon) such licensing agency may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute pursuant to section 107d-2 of this title, and the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter.

20 U.S.C. § 107d-2(a):

> Upon receipt of a complaint filed under section 107d-1 of this title, the Secretary shall convene an ad hoc arbitration panel as provided in subsection (b) of this section. Such panel shall, in accordance with the provisions of subchapter II of chapter 5 of Title 5, give notice, conduct a hearing, and render its decision which shall be subject to appeal and review as a final agency action for purposes of chapter 7 of such Title 5.

20 U.S.C. § 107d-3(d):

> Subsections (a) and (b)(1) of this section shall not apply to income from vending machines within retail sales outlets under the control of exchange or ships' stores systems authorized by Title 10, or to income from vending machines not in direct competition with a blind vending facility at individual locations, installations, or facilities on Federal property the total of which at such individual locations, installations, or facilities does not exceed $3,000 annually.

## STATEMENT OF THE CASE

This is a suit to enforce an arbitration award in favor of petitioners, the Texas State Commission for the Blind, and the State of Texas, concerning their entitlement to receive millions of dollars in vending machine income collected by the Department of Defense (DOD) as provided by the Randolph-Sheppard Act, 20 U.S.C. § 107 ("The Act"). The Act was passed in 1936 to provide economic opportunities for the blind by granting them priority to operate vending facilities on federal property. On December 7, 1974, Congress amended the Act to significantly enlarge its scope. Congress was explicit that the purpose of the amendment was to provide more sources of revenue for the blind and to eliminate the use of vending machines that compete with blind vendors and thwart the very purpose of the Act. The revenue due to the Texas State Commission for the Blind (TSCB) under this section is essential for the blind to be given the full and fair economic opportunities envisioned by Congress. TSCB is empowered by § 107d-3(c) to use such vending machine income to establish retirement benefits, pension programs, and paid health insurance and sick leave. To further insure the self-sufficiency and dignity of the blind vendors, section 107d-3(c) also empowers TSCB to spend any surplus revenue on the equipment and facilities that are used by the blind vendors so that they may provide truly competitive services with the sighted and be insured a livelihood. As can be seen by all sections of the 1974 amendments, Congress' intent was to significantly expand the number of facilities

opportunities available to the blind and to clamp down on any source of competition by federal agencies that sought such revenue for their own use.

This far-reaching purpose is also demonstrated by the fact that the Act contains only three very narrow exemptions from the income sharing provision. These are set out in Section 107d-3(d):

> Subsection (a) and (b)(1) of this section shall not apply to income from vending machines within retail sales outlets under the control of exchange or ships' stores systems authorized by Title 10, or to income from vending machines operated by Veterans Canteen Service, or to income from vending machines not in direct competition with a blind vending facility at individual locations, installations, or facilities on Federal property the total of which at such individual locations, installations, or facilities does not exceed $3,000 annually.

The language in section 107d-3(d) is explicit that only those machines "within retail sales outlets" are exempted. Further, the regulations promulgated by the Department of Health, Education & Welfare[2] are even more explicit that machines not physically within the four-walls of a retail store may not be excluded. 34 C.F.R. § 395.33(i). Despite the wording of the Act and the HEW Regulations, the Department of Defense issued its own regulations exempting all vending machines operated in *or by* military exchanges. 32 C.F.R. 2603(3). In other words, the Department of Defense (DOD) decided that even if a vending machine were not located physically within a retail store, as long as it was *operated by the store*, it could be exempted, regardless of its actual location. This regulation was promulgated by the DOD over the expressed objections of HEW. The Department of HEW specifically rejected DOD's claim and in the "Supplementary Information to Regulations" published in the Federal Register HEW concluded that it would not broaden its interpretation of the exemption and that

2. The Department of HEW is the Department solely and expressly authorized by the Act to survey and designate sites for vending facilities and oversee the income sharing provisions in the Act. 20 U.S.C. §107(a).

any such expansion would have to come from Congress. 42 Fed.Reg. 15807 (March 23, 1977).

A conflict was thus created by DOD's exemption of a large number of vending machines not within retail sales outlets on military bases and installations located in Texas. The advice of the General Accounting Office was solicited as to whose interpretation of the exemption was correct. After a careful review of the language of the Act and the legislative history of the 1974 amendments, the GAO rejected DOD's claims and concluded that only those machines located physically within retail sales outlets were intended to be exempted.[3]

After weighing all the arguments the GAO examination concluded:

> We conclude that HEW and its regulations most accurately interpret the law. On the basis of the language of the statute and its legislative history, we believe DOD's contention that all exchange system vending machines are excluded from income-sharing provisions of the Act is inconsistent with the law as well as HEW's regulations.

*Id.* at 10.

Congress, however, foresaw that differences in interpretation of the Act might arise, and "built-in" to the 1974 amendments a procedure for resolving disputes. In order to avoid protracted intra-governmental litigation, Congress provided for binding arbitration to quickly and inexpensively resolve controversies under the Act. Thus, sections 107d-1 and 107d-2 were added which empower the Secretary of HEW to convene an arbitration panel pursuant to standards and procedures specifically delineated in the Act. Section 107d-1 provides that

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3. "G.A.O. Examination of Department of Defense and Postal Service Compliance with Vending Machine Income Sharing provisions of Randolph-Sheppard Act" Feb. 17, 1979, reprinted in *Oversight of the Randolph-Sheppard Act.* Hearings before the Subcommittee on the Handicapped of the Committee on Labor and Human Resources, United States Senate, 96th Congress, 1st Session, April 30, 1979, pp. 9-13.

the "decision of such panel shall be final and binding...." This, section goes on to provide that the only instance when an arbitration panel's award is reviewable, under any circumstances, is pursuant to "chapter 7 of Title 5" (The Administrative Procedure Act).

All procedural requirements of Section 107d-1 and 107d-2 were met to resolve the present conflict between the TSCB and DOD; and DOD has not denied this fact. In May of 1979, the Office of the Attorney General of the State of Texas filed a complaint against the DOD. The complaint alleged that the failure of DOD to pay to TSCB vending machine income from machines located on Texas bases was violative of the Act and the HEW regulations. On July 3, 1979 HEW approved TSCB's complaint and pursuant to § 107d-(b)(2) each party chose a panel member to arbitrate the disputed question. On September 2, 1981 the panel handed down its twenty-seven page decision, rejecting the interpretation of the exemption offered by DOD and ordering DOD to:

> ...reimburse the TSCB for all income due consistent with this meaning since the effective date of the 1974 amendments.

Arbitration panel decision p. 18 (Reprinted in Appendix C).

Since the entry of the September 1981 decision, until TSCB filed suit to enforce the arbitration award in March of 1983 in the United States Claims Court, DOD failed to appeal the award in any court. On November 26, 1984, the Claim Court (Merow, J.) affirmed the decision of the arbitration panel and rejected DOD's expansive reading of the "military exchange exemption." (Opinion reprinted in Appendix B). The Court of Appeals for the Federal Circuit heard the appeal *en banc* and by a divided court reversed the judgment of the Claims Court (Opinion reprinted as Appendix A). This petition follows.

## REASONS FOR GRANTING THE WRIT

The Federal Circuit (and the Tenth Circuit in *Oklahoma v. Weinberger,* 741 F.2d 290 (10th Cir. 1983) *cert. denied* 104 S.Ct. 2345 (1984)) have interpreted the income sharing provisions of

the Randolph-Sheppard Act in such a way as to emasculate a necessary program for the blind and have allowed the Department of Defense to divert several million dollars annually from the blind.

Even if this statutory misconstruction of a vital congressional program is insufficient reason to grant this writ, the opinion below has created a significant split of authority concerning procedural issues that greatly impact upon the administration of the Federal judiciary: in its haste to reach the merits, the court below ignored an opinion of a properly convened arbitration panel and substituted its opinion for the expert and neutral agency designated by Congress to administer and interpret the income sharing provisions at issue. If the Federal Circuit's opinion is left intact, virtually all litigants with claims against the federal government may litigate issues Congress has expressly foreclosed.

## I) THE DECISION OF THE ARBITRATION PANEL IS FINAL AND BINDING AND MAY NOT BE SET ASIDE.

The majority decision of the Court of Appeals seriously distorts the arbitration process established by Congress to resolve disputes between the federal government and the states. The statutory language and the legislative history of the Act demonstrate that Congress specifically sought to avoid protracted intra-governmental disputes and to establish a binding arbitration process. The Court of Appeals decision gave no credence to the arbitration award and also allowed DOD to ignore the award for almost two years before lodging any objections to its merits.

### A) The Randolph-Sheppard Act Does Not Allow Federal Agencies To Appeal An Arbitration Panel's Decision.

The Court of Appeals determined that the arbitration panel convened pursuant to 20 U.S.C. § 107d-2(b) reached the wrong decision. The threshold question is whether the Court may sidestep the arbitral process in the face of a congressional declaration that arbitration shall be final and binding.

#### 1) The Federal Government Is Not A "Person" Under The

**Administrative Procedures Act And Thus Cannot Appeal A Panel's Award Under The Randolph-Sheppard Act.**

There is no dispute that Congress intended for arbitrator's decisions to be respected; Section 107d-1(b) of the Act provides:

> Whenever any state licensing agency determines that any department, agency or instrumentality of the United States that has control of the maintenance, operation and protection of federal property is failing to comply with the provisions of this chapter or any regulations thereunder sucy licensing agency may file a complaint with the Secretary who shall convene a panel to arbitrate the pursuit to section 107d-2 of this title, *and the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter.* (emphasis added).

The relevant proviso mentioned in this last sentence is contained in § 107d-2 which provides that:

> Such panel shall . . . render its decision which shall be subject to appeal and review as a final agency action for purposes of chapter 7 of such Title 5 [The Administrative Procedure Act].

The wording of § 107d-1(b) is clear, precise, and unambiguous; it provides that an arbitration panel's decision is "final and binding" except under those provisions of the Administrative Procedures Act (A.P.A.) which allow an aggrieved *person* to appeal. It is well settled that the federal government is not entitled to initiate an appeal under the A.P.A.. Section 702 of the A.P.A. provides that:

> A *person* suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action with the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. § 702 (emphasis added).

The A.P.A. is explicit that the term "person" does not include

agencies of the federal government. Section 551 defines "person" (for purposes of who may seek judicial review) as follows:

> ... person includes an individual, partnership, corporation, association, or public or private organization *other than an agency.*

5 U.S.C. § 551(2) (emphasis added).[4]

DOD is thus explicitly not a person within the terms of the A.P.A. and has no right to appeal or challenge an arbitration award under the Randolph-Sheppard Act.[5]

**2) Sound Policy Reasons Support Congress' Decision To Deny The Federal Government The Right To Appeal An Arbitration Panel's Decision.**

The Court of Appeals concluded that because Congress granted blind vendors and state licensing agencies the power to appeal, Congress must also have intended ("by implication") to grant that authority to federal agencies. A-8 (fn. 8). By modeling the appeals process upon the requirements of the A.P.A. (as opposed to simply providing that any dissatisfied party can appeal an award as arbitrary or capricious), Congress has stated that the federal government should be bound by arbitration. The wisdom of this rule is two-fold: it denies the federal government, with all its resources, the opportunity to "outlast" blind vendors and state agencies through the lengthy and costly appeals process, *see, generally, S & E Contractors, Inc. v. United States,* 406 U.S. 1, 7-8 (1972); *Fischbach & Moore International Corp. v. United States,* 617 F.2d 223, 226-8 (Ct.Cl. 1980); and

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4. Section 701 adopts the definition of the word "person" in section 551. 20 U.S.C. § 701(b)(2).

5. The legislative history of the A.P.A. also squarely supports the argument that no right of governmental appeal was ever envisioned by the framers of the A.P.A.. Both the Senate and House Reports explain that the term "person" was explicitly drafted so as to exclude federal agencies from obtaining judicial review. S. Rep. 752, 79th Cong., 1st Sess. p. 10 (1946).'The definition of person includes both individuals to any form or organization but advisedly excludes Federal agencies'), H. Rep. 1980, 79th Cong., 2d Sess. p. 19 (1946), (Both the House to Senate Reports are Reprinted in Administrative Procedure Act: Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. pp. 196, 253 (1946).

it establishes that when one branch of the federal government sets up an arbitration process, other branches of that same government should be bound by the arbitrator's decision. *S & E Contractors,* 406 U.S. at 10-13; *Fischbach,* 617 F.2d at 227-8.[6]

The Federal Circuit (and the DOD) may consider that denying the government the right of appeal is unfair or inequitable, but it is undeniable that foreclosing appeal, especially in the context of arbitration, is well-within Congress' power. *Griffin v. Illinois,* 351 U.S. 12, 18 (1955); *Cohen v. Beneficial Loan Corp.,* 331 U.S. 541, 545-46 (1949). Cognizant of its power, Congress has, at times, specifically provided for *federally* initiated appeals of administrative action. *See,* Civil Service Reform Act, 5 U.S.C. § 7703(d); Contracts Dispute Act, 41 U.S.C. § 607(g)(2)(b). These statutes highlight the absence of any such provision in the Randolph-Sheppard Act and the A.P.A..

**3) The Legislative History Of The Randolph-Sheppard Act Proves That Congress Intended To Deny The Federal Government The Ability To Appeal.**

That Congress specifically intended to deny a federal agency the ability to appeal a decision of an arbitration panel convened by the Secretary of HEW is also apparent from an earlier version of section 107d-1. An earlier draft of this section was more detailed: it explicitly delineated who could appeal and *tracked* the terms of section 702 of the A.P.A.:

> Nothwithstanding other provisions of the Act, *any blind person or state licensing agency* suffering legal wrong because of any agency action within the meaning of this Act or other relevant statutes, shall be en-

6. Although this Court has consistently identified "a strong bias in favor of review of administrative action," the policy arguments favoring reviewability do not apply when the aggrieved party is simply another agency of the federal government. *Barlow v. Collins,* 397 U.S. 159, 166-67 (1970); *Abbott Laboratories v. Gardner,* 387 U.S. 136, 139-43 (1967). *Barlow* and *Abbott Laboratories* both involve a private party's challenge to federal agency action; thus, the democratic principles of governmental accountability that form the basis of these decisions do not apply in the context of one federal agency attempting to appeal another agency's decision. *Barlow,* 397 U.S. at 465; *Abbott Laboratories,* 387 U.S. at 140-41.

> titled to and shall have standing for judicial review thereof.

S.2461, 91st Cong., 2d Sess. (1969), S.2506, 92 Cong., 1st Sess. § 10 (1971). The earlier version demonstrates that Congress intended to provide the right of appeal only to non-federal entities. The final version provides for the exact same right of appeal: one version merely *quotes* A.P.A. and the other *refers* the reader to its terms.[7] The earlier drafts prove unequivocally that Congress intended for the federal party to be bound by the arbitration panel's decision and there is no evidence in any of the legislative history that a change in policy occurred.[8]

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7. Congress' intentions become clear when the earlier and final drafts of section 197d-2 are "held up" to the terms of the A.P.A. and compared. Section 702 of A.P.A. provides:

> A PERSON SUFFERING LEGAL WRONG BECAUSE OF AN AGENCY ACTION OR ADVERSELY AFFECTED OR AGGRIEVED BY AGENCY ACTION WITHIN THE MEANING OF A RELEVANT STATUTE IS ENTITLED TO JUDICIAL REVIEW THEREOF.

Senate Bill 2506 (92nd Cong., 1st. Sess. 1971) and Senate Bill 2461 (91st Cong., 2nd Sess. 1969) both provide:

> Any blind person or state licensing agency SUFFERING LEGAL WRONG BECAUSE OF an AGENCY ACTION, OR ADVERSELY AFFECTED OR AGGRIEVED BY SUCH ACTION WITHIN THE MEANING OF this or other RELEVANT STATUTES, shall be ENTITLED TO and shall HAVE standing for JUDICIAL REVIEW THEREOF.

Capitalized words are identic to those in the A.P.A.. The Randolph-Sheppard Act, 20 U.S.C. § 107d-2(d), provides:

> The arbitration panel shall render its decision which shall be subject to appeal and review as a final agency acting for purposes of chapter 7 of such title 5.

8. The Senate Report confirms that Congress did not intend to create a right of appeal in favor of the government in the final version of the Act:

> It is the expectation of the committee that the arbitration and review procedures will provide means by which *aggrieved*

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Because Congress expressly did not create a right of appeal, none may be created. The Court of Appeals circumvented this Congressional intent by characterizing DOD's conduct not as an "appeal" but merely as "defending against enforcement of the award." A-8. This hypertechnical distinction nullifies Congress' intent by allowing DOD to do indirectly what it can not do directly. Although the Act does not allow DOD to appeal an award, the Federal Circuit is willing to allow DOD to *ignore* the award and raise any argument it would have raised in its appeal in a suit to enforce the award. If such were Congress' wishes, it would not have provided, tersely, that the arbitrator's decision is "final and binding."

**B) Even If The Randolph-Sheppard Act Permits A Federal Agency To Appeal An Arbitration Award, DOD Has Waived That Right By Failing To Timely File An Appeal.**

Even if DOD had a right of appeal, it waived that right by failing to take any action contesting the award until TSCB brought suit to enforce it, almost twenty months later.

Ours is not a case where a federal agency was held to be in non-compliance with the Randolph-Sheppard Act and then, immediately and in good faith, filed a petition in federal district court to set aside the arbitration award. Rather, ours is a case where a federal agency determined it would be prudent to

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> *vendors and state agencies* may obtain a final and satisfactory result.

Sen. Rep. No. 937, 93rd Cong., 2nd Sess. (June 17, 1974 p. 20). (emphasis added). As one District Court has commented concerning Congress' intention concerning arbitration:

> I am impressed by the obvious Congressional preference that disputes under the Randolph-Sheppard Act be resolved through the administrative rather than judicial proceedings.

*Massachusetts Elected Committee of Blind Vendors v. Matava*, 482 F.Supp. 1186, 1189 (D.Mass. 1980); *see, Fillinger v. Cleveland Society For The Blind*, 587 F.2d 336, 338 (6th Cir. 1978), *reh'g denied*, 591 F.2d 387 (6th Cir. 1979).

ignore the award and stall the opposition (J.A. 75). Because arbitration was specifically designed to provide a speedy, efficient alternative to litigation, the federal courts are unanimous that a party can not sit on an adverse arbitration award for almost two years and challenge it for the first time in a suit to enforce the award.

**1) Federal Law Requires The Application Of A Statute Of Limitations.**

On the issue of a federal statute's failure to specifiy a statute of limitations, this Court has recently reiterated that:

> In such situations we do not ordinarily assume that Congress intended that there be no time limit on actions at all; our task is to "borrow" the most suitable statute or other rule of timeliness from some other source. We have generally concluded that Congress intended that the courts apply the most closely analogous statute of limitations under state law.

*DelCostello v. Teamsters,* 462 U.S. 151, 158 (1983). The A.P.A. is just such a statute. Although it contains no express statute of limitation, it does not extend the time limit for challenging agency action indefinitely; *Califano v. Sanders,* 430 U.S. 99, 108 (1977); *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967).

**2) DOD Has Failed To Appeal Within Either The Federal Or State Statute Of Limitations For Challenging An Arbitration Award.**

Federal Courts have always applied time limits in suits to set aside an arbitration award where the federal statute that set up the arbitration proceeding does not specify a time period. There is universal agreement that the limitations period to be applied must be short so as not to frustrate the goals behind the whole policy of arbitration.[9] Since arbitration is intended

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9. In three cases decided in the last two years, this Court has commented upon the respect and deference that the federal courts must show to arbitration convened under federal law. *Southland Corp. v. Keating,* 104 S.Ct. 852, 859 (1984); *W.R. Grace and Co. v. Local Union 759,* 461 U.S. 757, 764-65

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to provide the litigants an opportunity to have their disputes resolved quickly, it would run counter to that goal to allow a disgruntled party to sit on an unfavorable award for a long period of time.

The decision of the Federal Circuit has created a split of authority concerning the need to impose short statutes of limitations upon actions to set aside arbitration awards. The Seventh Circuit, taking the contrary view, has recently explained:

> ...the purpose of the short periods prescribed in the federal and state arbitration statutes for moving courts to vacate an award is to accord the arbitration award finality in a timely fashion. As the district court observed, this policy would seem to *condemn the conduct of the defendant who ignored an award disfavorable to it, failed to move to vacate the award, and then sought to be given its day in court when the plaintiff brought suit in frustration to have the arbitration award enforced.* If the defendant's defenses were of such vital importance to it, the defendant nevertheless had an opportunity to raise them in the manner contemplated by statute.

*Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union No. 135 v. Jefferson Trucking Co.*, 628 F.2d 1023, 1027 (8th Cir. 1980). *See, United Parcel Service v. Mitchell*, 451 U.S. 56 (1981).

The United States Arbitration Act provides the most analogous filing deadline in federal law. It provides that an action to set aside an award must be commenced "within three

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(1983); *Moses H. Cone Memorial Hospital v. Mercury Construction*, 460 U.S. 1, 24-25 (1983). If arbitration decisions are not considered final or are appealable indefinitely, the "national policy" favoring arbitration as an expedient alternative to litigation is lost and arbitration becomes a hollow "warm-up" rather than an effective vehicle to limit federal litigation. *Southland*, 104 S.Ct. at 852; *W.R. Grace*, 461 U.S. at 757; *Moses H. Cone*, 460 U.S. at 1. *See, United Parcel Service v. Mitchell*, 101 S.Ct. 1559, 1565 (1981).

months after the award is filed or delivered." 9 U.S.C. § 12. The applicable state provisions are essentially identical to the Federal Arbitration Act. The arbitration acts enacted by both the state of Texas and the District of Columbia (the only two jurisdictions whose laws might apply to the instant case) provide for a strict 90 day period for the commencement of actions to set aside arbitration awards. TEX.REV. CIV. STAT.ANN. art. 237(b). (For the District of Columbia provision, *see, DelCostello,* 462 U.S. at 166, n. 15).

By failing to take any action whatsoever to challenge the arbitration award for a period approaching two years, DOD is beyond any applicable statute of limitations. Thus, even if DOD had a right of appeal under the A.P.A., it has lost that right by failing to assert it in a timely manner.

**3) No Exception Exists To Excuse DOD's Failure To Timely Appeal.**

The majority of the Court of Appeals decided that an arbitration award under the Act may be open to attack indefinitely when a federal agency is the aggrieved party. A-8. fn. 8, citing *U.S. v. Sommerlin,* 310 U.S. 414 (1940); *Guaranty Trust v. U.S.,* 304 U.S. 126 (1938). There are two soft-spots in the Court of Appeal's reasoning. First, neither of the cases cited involve *arbitration.* When arbitration is involved, this Court has recently and specifically decided that special policy considerations must be weighed so as to not frustrate the arbitration process, regardless of who is a party. *See, Southland,* 104 S.Ct. at 852; *W.R. Grace,* 461 U.S. at 757; *U.P.S. v. Mitchell,* 101 S.Ct. at 1565. Second, and perhaps more important, the Court of Appeals argument is premised upon more than a little sleight-of-hand. The Court argues that if a statute is silent on the issue of limitations, no period applies to the United States (A-8): *In this instance, the relevant statute does not address the procedural issues surrounding the government's rights of appeal precisely because Congress did not intend to create any such right of appeal at all.*

In conclusion, the Act does not create a right of appeal in favor of DOD and the creation of such a right must come from Congress. Congress has exercised its judgment to minimize

protracted intra-governmental disputes and graciously denied federal agencies the right to appeal. Although DOD may consider this an unwise declaration of policy, it may not argue that this action was not in Congress' clear authority. Furthermore, the rulings of this Court make it clear that no party, even the federal government, should be allowed to sit on an unfavorable arbitration award and challenge it for the first time in a suit to enforce the award.

## II) THE COURT OF APPEALS INCORRECTLY IGNORED HEW's INTERPRETATION OF THE MILITARY EXCHANGE EXCEPTION IN THE RANDOLPH-SHEPPARD ACT.

The Court of Appeal's majority opinion creates a split of authority among the circuits concerning the proper agency to administer and interpret the Act. This petition will demonstrate that by failing to defer to the Secretary of HEW's interpretation of the Act, the Court of Appeals has violated the expressed intentions of Congress and the rulings of this Court.

### A) Congress Specifically Determined That HEW Should Administer And Interpret The Act.

There is no question that, when drafting the Act, Congress specifically selected the Department of HEW as the neutral and expert agency to administer the Act and adopt regulations interpreting and implementing the statute's mandates, 20 U.S.C. §§ 107(b), 107a, 107d-3(g). The legislative history of the Act also unmistakably demonstrates that because of the prior abuses of many federal agencies--including DOD--Congress viewed HEW as having the "expertness and sensitivity to the blind vendor program which may be lacking in other agencies." Sen. Rep. 93-937 (93rd Cong., 2nd Session—June 17, 1974) at 19.[10]

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10. Senate Report 93-937, the Senate Report relied upon the Court of Appeals, goes on to explain:

> The Committee finds that there is a record of abuses and neglect of the Randolph-Sheppard program by officials of various Federal

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Pursuant to its rule making authority, HEW promulgated regulations adopting TSCB's construction of the exemption and specifically rejected DOD's expansive and self-serving interpretation. 34 C.F.R. § 395.33(i). To amplify upon its decision, HEW published "Supplementary Information to Regulations" in the Federal Register, explaining that it was rejecting the interpretation urged by DOD and that any such expansion would have to come from Congress. 42 Fed. Reg. 15802, 15807 (March 23, 1977).

**B) The Interpretation Of HEW Is Reasonable And Must Be Deferred To.**

The interpretation of an Act by the official or agency charged with administering and overseeing it is one to which the courts should give great deference. *United States v. Clark*, 454 U.S. 555, 565 (1982); *Udall v. Tallman*, 380 U.S. 1, 16 (1965). This is especially true when the Court is asked to resolve an issue that is based upon conflicting indicia of legislative intent. *Id.; see, Burlington Northern Railroad Co. v. United States*, 752 F.2d 627, 629 (Fed. Cir. 1985). Because HEW was specifically authorized by Congress to administer and oversee the income sharing provisions of the Act, its decision should be overruled only if this Court is convinced that it is "irrational". *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980); *Hi-Craft Clothing Co. v. N.L.R.B.*, 660 F.2d 910, 194-15 (3rd Cir. 1981); Jaffe, Judicial Control of Administrative Action, 572 (1965).

The District of Columbia Circuit has repeatedly recognized, in passing upon questions concerning the interpretation of the Randolph-Sheppard Act, that the proper starting point for judicial review is whether the decision of *HEW* is reasonable:

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> agencies that is adequate to justify the placement in increased overall authority for its operation with the Secretary of Health, Education and Welfare. As indicated earlier the program in the Federal section has stagnated. At the end of fiscal year 1971, there were 881 blind vending facilities on Federal property. By the end of the 1972 fiscal year the number had been reduced to 878. At the end of 1973 there was further reduction to 874 facilities.

Sen. Rep. 93-937 at 16.

> The plaintiffs ask us to go far beyond this standard of review by substituting their policy judgments for those of the expert agency designated to oversee the blind vendor program. This we may not do.
>
> . . .
>
> We may not change or declare illegal a rational scheme prescribed by the expert agency specifically commissioned to devise it.

*Randoph-Sheppard Vendors of America v. Harris,* 628 F.2d 1354, 1366-68 (D.C. Cir. 1980); *See, Randolph-Sheppard Act Vendors of America v. Weinberger,* 795 F.2d 90, 103, fn. 20 (1986).

Contrary to the approach of the D.C. Circuit, and this Court, the Federal Circuit began its analysis at the wrong-end and determined that, in a close call, all deference would be given to the DOD. The Court below made no bones about its approach:

> The issue to be decided by this Court is whether the statute is capable of more than one interpretation and whether the agency's [DOD's] interpretation is reasonable.

A-9.[11]

This approach completely ignores the intentions of Congress and the holdings of this Court by failing to give deference to the agency chosen by Congress to make judgment calls per-

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11. True to this mind-set, the Federal Circuit concluded:

> After considering the ambiguities in the statutory language, the legislative history supporting DOD's position, the purpose of the exemption, and the status of the military exchanges as non-appropriated fund instrumentalities performing essential government services, we are convinced that *DOD's* regulation is reasonable....

A-26 (emphasis added).

taining to the competing policy interests involved in this area. *See, generally, United States v. Riverside Bayview Homes, Inc.*, 106 S.Ct. 455, 461 (1985).[12]

Although this petition (in Section III) will demonstrate that DOD's interpretation of the "military exemption" is contrary to the plain meaning of the statute and its legislative history, petitioners recognize this is a close call. The scope of the military exchange exemption has been decided six times: HEW, the General Accounting Office, the Arbitration Panel, and the Claims Court resolved the issue in TSCB's favor; while the Court below and the Oklahoma Courts went for DOD. This split, at worst, indicates that persuasive evidence exists on both sides and that reasonable minds certainly differ. In such a situation, the interpretation of the neutral and implementing agency chosen by Congress must be deferred to and respected. Even if TSCB concedes that DOD, too, has *a reasonable* interpretation of the exemption, it is undeniable that a narrow reading of the scope of the exemption is also *a reasonable* construction. In such a situation, the reasonable interpretation of the agency chosen by Congress must be deferred to and respected. The Federal Circuit does violence to this cannon of statutory interpretation by failing to realize that it is *HEW's* construction of the exemption that must be accepted, if reasonable. HEW's interpretation may only be disregarded if it leads to an "absurd" result. *U.S. v. American Trucking Association*, 310 U.S.

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12. Congress expressly realized that many federal departments, including DOD, would *claim* that vending machine revenue was "essential" to their interests. Rather than allow each department to make such decisions, Congress chose HEW to make all determinations as to the scope of exemptions. Section 107b provides, in pertinent part:

> Any limitation on the placement or operation of a vending facility based on a finding that such placement or operations would adversely affect the interests of the United States shall be fully justified in writing to the Secretary, who shall determine whether such limitation is justified. A determination made by the Secretary pursuant to this provision shall be binding on any department, agency, or instrumentality of the United States affected by such determination. The Secretary shall publish such determination, along with supporting documentation, in the Federal Register.

534, 543 (1940).[13] Not even the Federal Circuit claims that HEW's interpretation is "absurd" or unsupportable by reasoned analysis. In such a situation, the only approach permitted by this Court is to defer to the agency selected by Congress to make such judgment calls.

### C) HEW's Regulations And Interpretation Are Entitled To Deference Even Though Earlier And Unpublished Drafts Of The Regulations Considered DOD's Interpretation.

The Court of Appeals perceived that HEW's regulations and reasoning should not be considered because, during one stage of the drafting process, someone at HEW may have considered siding with DOD. A-19-A-23. The first major fallacy in this position is that the documents relied upon by the Court show no author and it is thus impossible to tell if these proposed rules were actually drafted by HEW personnel at all--they in fact could be suggested rules from DOD. J.A. 541. Even if these proposed rules were suggested by HEW, these excerpts bolster TSCB's argument that HEW embarked upon a thorough review of all possible points of view and fairly considered DOD's arguments. *See, TSCB v. U.S.*, 6 Cl.Ct. at 739, fn. 18; B-15; Arbitration Panel Decision at 17; C-14. It must also be remembered that this initial correspondence was never promulgated or published. Even if it were, it would not be sufficient to undermine HEW's credibility. This Court has recently explained:

> The fact that the agency has from time to time changed its interpretation of the term "source" does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation

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13. "Absurd" in this context does not mean "debateable" or "arguably incorrect". Rather, DOD bears the burden of showing that a literal reading would impute to Congress an *irrational* purpose. *United States v. Bryan*, 339 U.S. 323, 388 (1950). A party upholding the literal meaning of a statute, on the other hand, must only show its interpretation "*appears* to be consonant with the purposes of the Act." *Trans Alaska Pipeline Cases*, 436 U.S. 631, 643 (1978); *Commissioner v. Brown*, 380 U.S. 563, 571 (1965). *See*, pp. 25-27, *infra*.

> is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.

*Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 104 S.Ct. 2778, 2792 (1984).

### D) HEW Has Never Withdrawn Its Regulations Nor Changed Its Interpretation Of The Exemption.

The Court of Appeals believed that HEW has, somehow, seen the error of its ways and has renounced its reading of the exemption. This is certainly not the case. The regulations interpreting the exemption as applying only to vending machines within the four walls of retail sales outlets are still on the books and effective. 34 C.F.R. § 395.37(a). Similarly, GAO has taken no action withdrawing its formal opinion on the scope of the exemption. GAO/Socolar Memorandum, B-183894-O.M. (J.A. 302-11).

The Federal Circuit held that HEW's interpretaion is no longer germane because, once an interagency dispute was discovered, the Department of Justice was empowered to resolve the dispute. A-23. The record clearly reveals, however, that the Department of Justice was not functioning in the neutral position that the Court's argument is premised upon: In fact, the Court of Appeals admits that the issue reached the Justice Department only *after* suit was filed in Oklahoma. A-23; J.A. 800.[14]

Thus, the Department of Justice was already functioning as the government's lawyer in response to pending litigation against the United States. Like any good lawyer would, the Department of Justice was merely informing its clients not to take any action that would compromise the litigation in progress. The Department of Justice thus issued no formal opinion, nor could it have under federal law, because the matter

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14. The Court of Appeals recognized "... it was not until the Oklahoma litigation that the matter was referred to the Department of Justice for resolution of the conflicting HEW/DOD interpretations." A-23.

was under litigation. *Hughes Aircraft Co. v. U.S.*, 534 F.2d 889, 99 (Ct.Cl. 1976). *See, S & E Contractors v. U.S.*, 406 U.S. 1, 11; 28 U.S.C. §§ 512, 576; 38 Op. A.G. 149 (1934). Thus, there is absolutely no support for the stance of the Court below that the views of HEW and DOD are "on a par". A-23, fn. 22. In the most recent case involving the Randolph-Sheppard Act, the D.C. Circuit rejected this argument and held that after legal action is initiated, the Department of Justice only posits the government's "litigation stance" and that the arbitration panel's decision to reject that stance must be respected. *Randolph-Sheppard Act Vendors v. Weinberger*, 795 F.2d at 107.[15]

## III) THE BROAD INTERPRETATION OF THE MILITARY EXCHANGE EXEMPTION IS CONTRARY TO THE WORDING OF THE EXEMPTION, THE STATUTE AS A WHOLE AND THE ACT'S LEGISLATIVE HISTORY.

At issue in this case is the meaning of the exemption provided to the military exchange system in section 107d-3 of the Randolph-Sheppard Act. Also at issue in this case are two conflicting approaches of statutory construction. The Federal Circuit's majority opinion begins its analysis with a discussion of the Act's lengthy legislative history in an attempt to sidestep the language of the statute and "establish" Congress' purpose. This approach is wrong-headed because it downplays the most persuasive evidence of legislative intent: the words chosen by Congress to effectuate its goals. *U.S. v. American Trucking Association*, 310 U.S. 534, 538 (1940). The statute's language and legislative history unequivocally preclude DOD's expansive reading of the exemption. Just as this Court has a duty to avoid an interpretation that produces an "absurd" result, so too does it have an obligation to apply a

15. Futhermore, the record contains absolutely no evidence or memorialazation of the Department of Justice's reasoning or rationale in making a determination. This Court has absolutely no idea what factors the Justice Department relief upon or how it made its decision—if it was *even* making the decision on the merits that it now urges it was. This Court, thus, has no way of comparing the weighing the Department of Justice's opinion versus the lengthy opinions and analysis by HEW and GAO.

statute as written when its mandate is clear and supported by "the policy of the legislation as a whole." *American Trucking Assoc.*, 310 U.S. at 534.

**A) The Statutory Language Clearly And Unambiguously Rejects DOD's Expansive Interpretation Of The "Military Exchange Exemption".**

Section 107d-3(d) provides:

> Subsections (a) and (b)(1) of this section shall not apply to income from vending machines *within retail sales outlet under the control of* exchange or ships' stores systems authorized by Title 10, or to income from vending machines not in direct competition with a blind vending facility at individual locations, installations, or facilities on Federal property the total of which at such individual locations, installations, or facilities does not exceed $3,000 annually. (emphasis added).

This section thus creates three distinct exemptions to the income sharing provisions of the Act: one exemption for the exchange systems, one exemption for the Veteran Canteen Service, and one for any machine, regardless of who operates it, with income less than $3,000 annually.

**1) The Phrase "Within Retail Sales Outlets" Has A Clear, Customary Meaning That Connotes Physical Containment.**

The exemption provided for the exchange systems, unlike the one provided for the Canteen System, contains two phrases of modification. As the italicized language in the statute shows, not only must the machines be *under the control of* the exchange system, the machines must also be *within a retail sales outlet.* As the dissenting opinion below and the Claims Court correctly determined, the plain and customary meaning of the word "within" clearly connotes spacial boundaries. The commonly understood meaning of "within" is "in or into the interior of or the parts or space enclosed by" or "the inside of a place, space or building." *Random House Dictionary of the English*

*Language*, (1967 Ed.). Thus, the customary meaning of "within retail sales outlets" is "within the four walls" of a retail sales outlet.

The Federal Circuit determined, however, that "within" implies more than just "contained in" and that the exemption protects all machines operated by the military exchanges.

In the context of section 107d-3(d), the interpretation of the Court below is that "within" really means "within and without." If the phrase "within retail sales outlets" means what DOD suggest it means, then the phrase "*under the control of*" the military exchanges adds nothing. In other words, such an interpretation completely reads out of the statute the phrase "within retail sales outlets." Basic principles of statutory construction require that effect be given to every word of the statute so that no part will be rendered meaningless. 2A Sand, Sutherland Statutory Construction § 46.06; *see, Ricker v. United States*, 396 F.2d 454 (Ct. Cl. 1968). Thus, the fact that two distinct phrases of modification were included in the statute clearly suggests that machines must be more than "under the control of" the military exchanges. The machines must also be "within a retail sales outlet."[16]

The only interpretation that accounts for all of the words in the statute and does not nullify any of its terms is that urged by TSCB. If Congress simply meant "under the control of" the military exchanges, it would not have included the phrase "within retail sales outlets" in the statute at all.

**2) Congress Provided The Veterans Canteen Service The Broad Exemption Sought By DOD And Expressly Denied It To The Military Exchanges.**

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16. The Court below recognized that DOD's interpretation renders the phrase "within retail sales outlets" surplusage, but claimed that "by the same token the words 'under the control of' are surplusage under HEW's and the Claims Court's interpretation." A-25. This unsupported statement is not correct. Under our interpretation, both phrases "do work." To qualify for the exemption, a vending machine has to be more than *within* an Exchange Store, it must be operated by the Exchange System as well. In other words, Congress did not want to "open up" the exemption by allowing any military group or organization to be entitled to the exemption by placing a machine in an exchange store or subletting space from the exchange system.

The majority below determined that the military exchange system deserves to be treated like the Veterans Canteen Service. Section 107d-3(d) specifically exempts "vending machines *operated by* the Veterans Canteen Service" (emphasis added). The wording of the exemption for the Canteen Services proves two things. First, Congress knows how to draft the exact exemption that DOD wants, because it did it in the very next clause. Second, this exemption proves that Congress only wanted to provide this broad exemption (that would encompass all machines, regardless of their location) to the Veterans Canteen Service.[17] *The fact that Congress drafted the exact exemption sought by DOD in the very next line of the act is the most persuasive indication that Congress did not intend to provide the broad exemption to DOD.*

### 3) The Distinction Between Vending Machines Inside Military Exchanges And In Other Locations Is Sound And Meaningful.

It is well settled that the literal and plain meaning of a statute should be enforced unless such an interpretation would lead to an "absurd" result. *American Trucking Association,* 310 U.S. at 543; *see,* fn. 13 *supra.*

Only two arguments are proferred to suggest that the interpretation adopted by HEW, GAO, the Claims Court and the Arbitration Panel leads to an absurd result. First, DOD argued that the distinction between vending machines inside and outside military exchange stores is not meaningful. As the dissenting judges realized, however, the distinction between machines within retail store and those located in other locations is perfectly consistent with Congress' goals and is evidence of the

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17. The reason for the distinction lies in the nature of the two departments. First, the Veterans Canteen Service is specifically authorized under law and is a direct entity of the federal government. 38 U.S.C. § 4201. Second, the Canteen System and the exchanges serve different customers and different ends. The legislative history shows that Congress was well aware of the Veteran Canteen Services' unique legal and factual status. Randolph-Sheppard Act for the Blind Amendments of 1973, Hearings before the Senate Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare. November 1973, p. 29, (hereinafter cited as "1973 Hearings"). DOD's own statistics show that vending machine sales represent only 3.5% of the Exchange System's total sales. (J.A. 377).

compromise struck between the exchange system and the blind. Congress exempted from the income sharing provisions the revenue from machines located *within* the exchanges, thereby allowing the exchanges to sell within the store, by machine, whatever they could sell ordinarily. In other words, a blind vendor could not claim that because an exchange store was selling cigarettes or drinks from a machine, rather than by a human, that he was entitled to share the income. On the other hand, the amendments do not allow the exchanges to delimit the exemptions by placing vending machines all over the base, thereby circumventing the act.[18]

The Court's second argument to establish the "absurdity" of TSCB's interpretation dealt with the putative overlap between the "military exchange exemption" and the $3,000 exemption. This argument fails to take into account that the two exemptions were added at different times and in response to completely different pressures. The exemptions for the exchange system and the Veterans Canteen Service were included in the first committee print of the 1973 Bill; the $3,000 exemption was added at a later time after negotiations with representatives from the Postal Service and the other non-DOD employee groups. GAO Memorandum from Milton J. Socolar, General Counsel, GAO to Director, Federal Personnel and Compensation Division, B-183894-O.M. (February 26, 1979) at 6 (hereinafter referred to as GAO/Socolar Memorandum). Thus, given the different nature of the exemptions, one for a specific group and one that is general and was added later, it is not

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18. It is DOD's interpretation that leads to a result plainly at variance with the purpose of the statue, because it would grant it the power to completely circumvent the Act. DOD regulations prohibit blind vendors from competing with vending machines operated by the exchange system. Army Air Force Exchange System Randolph-Sheppard Act Compliance Manual, ESM 11-2, p. 2-1. (J.A. 408). Thus, if DOD's interpretation prevails, it could keep all blind vendors off military bases by setting up an exchange machine anywhere on base and ruling that a blind vendor would be competing with that machine. This self-appointed power was pointed out to Congress by GAO and formed a basis for the narrow compromise exemption. "Randolph-Sheppard Act for the Blind Amendments of 1973," Hearing before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare, 93rd Congress, 1st Sess. (November 16, 19, December 6, 1973) p. 281.

surprising that there is an overlap.[19]

### B) The Legislative History Of The Randolph-Sheppard Act Supports The Literal Construction Adopted By HEW, GAO, The Arbitration Panel, And The Claims Court.

In this section of the petition, TSCB will advance three major arguments concerning the legislative history of the Act. First, the most reliable indica of legislative intent specifically and directly repudiates the expansive interpretation adopted below. Second, the two excerpts of legislative history DOD relies on are inconclusive and erroneous. Third, TSCB will demonstrate that the legislative history, when taken as a whole, establishes that the general purpose of the 1974 amendments was to eliminate the type of abuse that is present in this case.

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19. The crux of DOD's argument is that Congress would not have created a special exemption for the exchanges if Congress knew that "only 1.3% of exchange machines were inside retail stores" and that those machines would be covered by the $3,000 exemptions. The main problem with this argument is that there is absolutely no evidence that Congress was ever made award of the overlap. This is especially true given the fact that the $3,000 exemption was added in committee after the completion of the public hearings. *See,* GAO/Socolar Memorandum at 6-7 (J.A. 309-10) Arbitration Panel Award at 14 (J.A. 61). In fact, the data relied upon by DOD to show the extensive overlap between the two exemptions *was not collected until 1978.* (J.A. 561-62. 686). Aside from demonstrating that Congress was not aware of the overlap, DOD's data is also telling because it illustrates its "good faith" compliance with the statute. Of course, in 1978 only $.3% of all exchange vending machines were within retail sales outlets. Under DOD's expansive—and at that time unchallenged interpretation—it had no incentive to place the machines within the stores and every incentive to place them in profitable locations base-wide.

The final problem with DOD's argument concerning the $3,000 exemption is that the existence of an overlap in 1978 does not mean that all such vending machines will continue to earn less than $3,000 in the future. *See, TSCB v. U.S.,* 6 Cl.Ct. at 740; Arbitration Panel Award at 14, (J.A. 61). Also, DOD's statistics merely prove that *each individual machine* earned less than $3,000 in 1978. The "$3,000 exemption," however, does not necessarily apply to individual machines. Rather, the exemption applies to "income from vending machines ... the total of which at such *individual locations, installations or facilities* does not exceed $3,000 annually." 20 U.S.C. § 107d-3(d) (emphasis added). Thus, a bank of machines at the same location must have a combined income of less than $3,000 annually.

**1) The Most Reliable Indicia Of Legislative Intent Proves Congress Did Not Intend To Exempt All Vending Machines Operated By The Military Exchanges.**

The most reliable indicator of legislative intent in this case is the Conference Report prepared for members of both houses of Congress. The Conference Report for the 1974 amendments to the Randolph-Sheppard Act describes the military exchange exemption as excluding vending machines in "certain locations." S. Rep. 93-1270, 93rd Cong., 2d Sess. 35 (1974). H. Rep. 93-1457, 93rd Cong., 2d Sess. 35 (1974). By describing the exemption as applying only to machines in "certain locations," the Conference Report demonstrates that the exemption does not cover all vending machines. Despite the Claims Court's deference to the Conference Report, the Court of Appeals does not rebut its persuasiveness. Our interpretation is also borne out by the direct testimony of Senator Randolph, the sponsor of the Act.[20].

**2) The Two Isolated Excerpts Of Legislative History Relied Upon By DOD Are Inconclusive And Can Not Be Relied Upon To Eviscerate The Statute's Clear Language.**

Both the Federal Circuit and the Tenth Circuit in *Oklahoma v. Weinberger,* 741 F.2d 290 (10th Cir. 1983), *cert. denied,* 104 S.Ct. 2345 (1984), rely on two excerpts of legislative history to

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20. *Oversight of the Randolph-Sheppard Act, 1979,* Hearing before the Subcommittee on the Handicapped of the Senate Committee on Labor and Human Resources, 96th Cong., 1st Sess., April 30, 1979 at 19. Senator Randolph was responding to the statement and report of the General Accounting Office that, in its opinion, DOD's interpretation of the statute was incorrect. Mr. Kreiger, Director of the Federal Personnel and Compensation Division of the GAO testified: "On the basis of the language of the statue and its legislative history, we believe DOD's contention that all vending machines are excluded from income sharing provisions of the Act is inconsistent with the law as well as HEW's regulations." *Id.* at 17. Senator Randolph's interpretation of the statute is also clearly apparent on page 93 of the hearings: "Information provided to our subcommittee indicates DOD would lose approximately $4.4 million annually as support for its MWR activities if DOD *complied* with the Randolph-Sheppard Act." *Id.* at 93 (emphasis added).

support their interpretations of the statute: the "Brademas-Sikes Colloquy", 120 Cong. Rec. 35712 (Oct. 16, 1974), and one paragraph in Senate Report 93-937.

There are several reasons why the "Brademas-Sikes Colloquy" can not be relied upon as the controlling expression of legislative intent. First and most important, while Mr. Brademas *does* say that military exchange machines are exempted, he goes on to say that *all* military related vending programs are also totally exempted. This is so clearly erroneous that not even DOD is asking for an interpretation this expansive. Yet, it can be seen that this is what Mr. Brademas is saying when he answers "yes" to the following questions:

> Mr. Sikes:
>
> In section 7(d) of the amended act (section 206 of H.R. 14225), there is a statement that the income-sharing provisions as they pertain to vending machines "within the retail sales outlets under the control of exchange or ship's store's systems authorized by title 10," shall not apply. I would presume, and I would like the distinguished subcommittee chairman to verify for the record, that this provision exempts from the revenue-sharing plan all those vending machines which are operated by the military post exchanges, Navy exchanges, officer, and enlisted messes, and so forth ...
>
> Would the gentlemen confirm for me that fact that it is the intent that this paragraph *shall not apply to the military services,* and that this is in keeping with the language on page 24 of the Senate report (Sen. Rep. No. 93-937) which is more specific on this issue than is the conference report?

120 Cong. Rec. 35712 (emphasis added).

This colloquy supports the proposition that *all vending machines operated by the military* would be exempt, yet the legislative history is clear that no one else intended to so construe the exemption. Mr. Brademas' terse one word answer thus

can not be relied upon to overrule all other indicia of congressional intent. Mr. Brademas' answer is so obviously incorrect that it can not support an argument alleging anything other than the confusion of the speaker. Also, it was made at a time when there was not even a quorum present. 120 Cong. Rec. at 35712. This colloquy can not be used to eviscerate the plain meaning of the statutory language and the overwhelming bulk of the legislative materials.[21]

Senate Report 93-937 upon which Mr. Sikes based his question, and upon which DOD also relies, is similarly erroneous and over-inclusive in its interpretation. The paragraph cited by the Court states:

> Subsection (d) exempts certain activities from vending machines income assignment. Both military exchange systems and the Veterans Canteen Service *operate under specific statutory authority, and are thus, as a matter of policy,* excluded....

S. Rep. No. 937, p. 24 (J.A. 220) (emphasis added). Unlike the Veterans Canteen Service, 38 U.S.C. § 4201, however, the military exchange system *does not* operate under specific statutory authority. The Senate Report does not mention any other reasons why military exchange system vending machines should be excluded. Because the Senate Report does not show an intent to exclude military systems that are not specifically authorized, the Report is not overwhelming evidence that the

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21. Ours is certainly not the first case in which a discussion between two legislators has not been followed as the controlling view of Congress. In *Friedman v. United States,* for example, a colloquy between two Representatives was cited as evidence that the literal words of the Correction Board Statute, 10 U.S.C. § 1552, did not express its true legislative intent. 310 F.2d 381, 403 (Ct.Cl. 1963). In rejecting the off-the-cuff discussion of two legislators, the *Friedman* Court explained:

> The earlier colloquy at the hearings involving Congressmen Doyle and Clements—on which reliance has been placed ... can be said to represent only their own views and not the position of the subcommittee or the full committee, let alone of the House or the Senate as a whole.

*Id.* at 405 (citations omitted).

legislature intended to exclude the exchange system. Furthermore, the reliance of the Court below on this part of the Senate Report makes no sense, given the fact that page after page of the report details how DOD's abuses necessitated the 1974 amendments. Sen. Rep. 93-937 at 2, 10, 11, 15, 16, 17 (J.A. 198, 206, 207, 211, 212, 213).

### 3) The Legislative History Taken As A Whole Supports A Narrow Reading Of The Exemption And Rejects DOD's Expansive Interpretation.

If a reading of the legislative history of the 1974 amendments proves anything, it is that the purpose of the amendments was to vastly increase the opportunities available to blind vendors and to restrict those federal agencies and departments whose own vending programs were competing with the blind. The hearings, committee reports, and remarks made on the House and Senate Floor all demonstrate that a chief offender was DOD. The legislative history singles out three entities that had significantly impeded the blind vendors program on the federal level: the General Services Administration, Employee Groups that operate vending stands and machines for their own purposes (such as Postal Service Employees), and the Department of Defense. Sen. Rep. 93-937, 93rd Cong., 2nd Sess. (June 17, 1974, p. 10-11) (J.A. 206-07). In its opinion, the majority of the Court of Appeals cites several isolated passages that identify abuses by employee groups in an attempt[22] to show that the amendments were enacted to deal only with GSA and employee group abuses. This is disingenuous considering that the references to DOD abuses in the hearings and reports are much more numerous and scathing. (*See,* Appendix One, attached

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22. The passage quoted by DOD also includes several excerpts from reports and hearings concerning prior amendments (DOD Br. 15, 16, 17) dealing with Post Office and GSA abuses. These passages, by definition, are not indicative of the intent behind the 1974 Amendments. Furthermore, even the 1954 and 1970 legislative history is replete with evidence of Congress' concern about DOD's competition with blind vendors. (J.A. 202, 326). In fact, Congress in 1970 was so concerned about the stagnation of the blind vendor program that it commissioned GAO to investigate and issue a report and recommendations. The GAO Report, not surprisingly, identified DOD as one of the three entities responsible for the stagnation of the program. *See, Randolph-Sheppard Act for the Blind Amendments of 1973-Hearings* at 101, 252-315.

to this brief, for a compilation of excerpts from legislative documents chronicling DOD abuses). The legislative history characterized DOD, and no other agency, as "singularly insensitive" and "hostile or indifferent" to the blind vendor program. Sen. Rep. 937 at 10, 17 (J.A. 206, 213). Furthermore, the 1972 GAO Report commissioned by Congress specifically criticized the *military exchanges'* use of vending machines to compete with blind vendors. "Review of Vending Operations on Federally Controlled Property" Report to the Senate Subcommittee on the Handicapped, Committee on Labor and Public Welfare, B-176886 (Sept. 27, 1973) pp. 25-27; reprinted in "1973 Hearings" at 280-83. *See, TSCB v. U.S.*, 6 Cl.Ct. at 733 n. 6.

In sum, the legislative history of the act reveals its sweeping purpose to combat the "widespread, major abuses" that have impeded the growth of the blind vendor program and to double the size of the program. Sen. Rep. 937 at 11, 13 (J.A. 207, 209). The amendments were adopted to protect the blind from the military exchanges and not vice versa.[23]

### C) The Amount of Vending Machine Income Involved Is Neither Relevant Nor Supports The Court's Conclusion.

At bedrock for the Tenth and Federal Circuits is their conception that HEW's and the Claims Court's interpretation would deprive DOD of "current funds for *essential* government services for the military." (emphasis in original). A-9 - A-10; *see,* A-11. For purposes of argument, this brief will over look the fact that this claim is not supported in the record.

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23. Thus, when GAO was twice asked to resolve this issue, it twice concluded that the legislative history, taken as a whole, supports a narrow interpretation of the exemption:

> This is particularly so in view of the fact that the history is replete with statements from the bill's sponsor, representatives of DOD, and others as to DOD's past reluctance to share vending machine income of the blind vendors, leading in part to the need for an amendment to the prior law.

J.A. 311.

Regardless, two important points need to be made.[24]

First, the amount of money at stake is truly insignificant when compared to the total amount of annual income raised by the military exchange system. The Tenth and Federal Circuits have taken the position that Congress' failure to appropriate additional funds for the exchange system at the time the income sharing provisions were enacted supports the argument that Congress did not intend to divert a significant amount of funds from the exchange system. The fallacy in this argument is that the amount of funds diverted from the Army-Airforce Exchange System (AAFES) to the Blind is not significant enough to require a supplemental appropriation. The most recent estimate, compiled by DOD itself, is that compliance with the income sharing provisions of the Act would annually divert approximately $1.6 million dollars, nationwide. J.A. 562. This, compared to the total profit of the exchange system, is but a drop in the bucket. The most recent figures provided by DOD show that AAFES generated over 149 million dollars of *profit* that it provided to DOD's construction fund *and* over 139 million dollars in profit that it used to supplement Morale, Welfare, and Recreation (MWR) Programs. J.A. 681. Thus, it can be seen that compliance with the income sharing provisions of the Randolph-Sheppard Act would not necessitate a supplemental appropriation by Congress to keep the Exchange Systm afloat. The dissenting judges recognized this fact and even cited the 1979 testimony of General Umstead, the Director of the Exchange System, that compliance with the income sharing provisions of the Act would, at most, divert $4.4 million dollars out of an estimated $120 million profit that is distributed to MWR programs (or less than 4% of annually distributed funds). A-43.[25]

It is also important to stress that the amount of funds involved, even if significant, is really besides the point. The

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24. It is interesting to ponder, if this income was truly essential, why DOD never attempted to appeal the arbitration panel's award.

25. *See, Oversight of the Randolph-Sheppard Act, 1979: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources*, 96th Cong. 1st Sess. p. 93 (1979) (statement of Maj. Gen. Stanley M. Umstead, Jr.).

majority opinion waxes eloquent on the good deeds performed by the DOD, while the arbitration panel, HEW, the Claims Court, and the dissent all recognized the significance of the funds to the vitality of the blind vendors program. The key issue here is a political one that is solely within Congress' realm.

Lastly, it is important to stress that just as Congress has not enacted any supplemental appropriations, it also has never "overruled" HEW's interpretation of the military exchange exemption. HEW's narrow construction of the exemption was promulgated in 1977. Contemporaneously with those regulations, HEW explained in the *Federal Register* that it had finalized its position and that any change "would require enactment of statutory clarification." 42 Fed. Reg. 15807 (March 23, 1977). If, as DOD has suggested, its interpretation is so overwhelmingly correct and the decision of HEW so erroneous, it is certainly surprising that Congress has never sought to amend the Act or overrule HEW's position. In fact, the 1979 Oversight Hearings demonstrate Congress' support for HEW's interpretation. 1979 Oversight Hearings at 19, 93.

## CONCLUSION AND PRAYER

For all of these reasons, a writ of certiorari should be granted. The decision of a majority of the Federal Circuit incorrectly ignores a definitive resolution of this issue by both a properly convened arbitration panel and the expert agency authorized by Congress. Furthermore, even if the Court below properly reached the merits of this case, it interpreted the statutory provision involved clearly contrary to the will of Congress.

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# APPENDIX ONE

# EXCERPTS FROM LEGISLATIVE HISTORY SHOWING CONGRESSIONAL INTENT TO ELIMINATE DEPARTMENT OF DEFENSE NON-COMPLIANCE

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Sen. Rep. No. 937, 93rd Cong., 2nd Sess. (June 17, 1974) pp. 10-11; J.A. 206-07:

### NEED FOR LEGISLATION

> ...Commanders of military installations are singularly insensitive to the need to develop the program. The vast Defense establishment can report only 9 blind vendors at Air Force facilities, 17 on Army posts; and 16 at Navy bases. The parent Defense Department association at a major Federal space installation demanded that blind vendors give a portion of their income to the association—precisely the reverse of what should be taking place on Federal property. Employees at a west coast Federal building boycotted and threatened a blind vendor because he modestly increased prices on some of his items to meet inflating costs. It can be concluded from this and other evidence that there are widespread, major abuses of blind vendors and of the Randolph-Sheppard Program. It is the firm resolve of this committee that such abuses must case.

Sen. Rep. No. 937, p. 17; J.A. 213:

> A provision amending section 2(a)(2) of the Act (as redesignated) calls on the Secretary, during his annual survey of concession vending opportunities, to scrutinize particularly Federal property under the control of the General Services Administration, the Department of Defense, and the U.S. Postal Service.
>
> These three Executive Branch departments are in control of most of the structurally developed property of the Federal government. Accordingly, it is appropriate to expect that the three departments would

take the lead in providing vending locations for blind operators. Their performance in this regard has been less than satisfactory.

Very few blind vendors are to be found at military installations. Witnesses before the Committee have state that each military post or base commander is in charge of his particular installation, and that, for the most part, commanders are either hostile or indifferent to the Randolph-Sheppard program. This attitude has severely curtailed the growth of the program within the Defense Department.

Lt. General Leo Benade, the department's witness in the hearings on S.2581 recognized the deficiencies. He said:

I do not think the military departments ... are insensitive, but I think we can do better, and we will.

121 Cong. Rec. E16228 (May 22, 1975) (Remarks of Robert Humphreys, Special Counsel for the Senate Committee on Labor and Public Welfare) (J.A. 347):

The Defense Department has been a virtual monolith of opposition to the introduction of blind vendors at military installations, and State agencies have been powerless to do anything about it.

Randolph-Sheppard Act for the Blind Amendments of 1973, Hearings before the Senate Subcommittee on the Handicapped of the Committee on Labor and Public Welfare, 93rd Cong., 1st Sess. Nov. 19, 1973 pp. 101 (J.A. 345):

Senator Stafford: The GAO report suggests that the Department of Defense and its constitutent service branches have not in the past been sensitive to or interested in the blind vendor program. Would you agree that this has generally been the case?

General Benade: Yes, sir, Senator, I would. Unfortunately there is very little publicity concerning the

blind vendor program.

Comptroller General of the United States, General Accounting Office Review of Vending Operations on Federally Controlled Property; report to the Subcommittee on the Handicapped, Committee on Labor and Public Welfare, Reprinted in "Randolph-Sheppard Act for the Blind Amendments of 1973" p. 282 (J.A. 336):

> According to the most recent financial data available, annual gross sales from vending operations at the seven locations visited were over $12.8 million. Of this amount, blind vendors' gross receipts were about $230,600, while various nonappropriated fund organizations and commercial vending concerns had gross sales of $9.3 million and $3.3 million, respectively. In addition, the nonappropriated fund organizations earned $900,00 in commissions from vending machines to bring their total gross receipts to $10.2 million.
>
> The total net income blind vendors earned from four operations at three military installations was $38,000. (This represents all blind-vendor operations at the seven installations). The net income of the various nonappropriated fund organizations from vending operations at these seven locations totaled about $2.5 million. Generally, commercial concerns could not finish us net income data from their operations at the locations we reviewed because their accounting records were not organized to show this data.
>
> Blind vendors received income from 4 vending stands and no vending machines, while nonblind operators received income from 52 vending stands and 5,984 vending machines.
>
> The four blind vendors, who had a total annual net income of $38,000, had individual incomes ranging from $4,000 to $16,000. These vendors received no income from operating vending machines or through assignment of income from competing machines or other vending operations.